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July 10, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 28, 2005

Case Number: TSO-0315

This decision concerns the eligibility of XXXX X. XXX (hereinafter referred to as "the Individual") for reinstatement of an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled ~~A~~Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.¹

I. BACKGROUND

The present case involves an individual whose DOE access authorization has been suspended. On October 1, 2004, the Individual was involved in a domestic incident which led to his arrest for Aggravated Battery Against a Household Member, Assault Against a Household Member, Interference with Communications and False Imprisonment. Statement of Charges at 1. This arrest constituted derogatory information which raised security concerns about the Individual. Accordingly, the Individual was asked to submit to a Personnel Security Interview (PSI), which the Local Security Office (LSO) conducted on November 16, 2004. A transcript of this PSI appears in the Record as DOE Exhibit No. 36. The October 1, 2004 incident was not the only derogatory information in the Individual's security file involving domestic violence. The Individual's security file contained information indicating that his first wife had filed Petitions for Orders Prohibiting Domestic Violence on July 18, 1994, October 10, 1993, February 18, 1992 and February 16, 1992. The November 16, 2004 PSI failed to resolve the security concerns raised by the Individual's October 1, 2004 arrest and the four Petitions for Orders Prohibiting Domestic Violence filed against him by his first wife.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. ' 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

The Individual was then asked to submit to an examination by a DOE Psychiatrist. On June 7, 2005, the DOE Psychiatrist conducted a forensic psychiatric examination of the Individual. Prior to conducting this examination, the DOE Psychiatrist reviewed selected portions of the Individual's security file. On June 9, 2005, the DOE Psychiatrist issued a report in which he stated that the Individual met the criteria for Impulse Control Disorder, Not Otherwise Specified (NOS), as set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revised (DSM-IV-TR). DOE Exhibit 17 at 9-10. The DOE Psychiatrist further opined that this medical condition causes, or may cause, a significant defect in the Individual's judgment or reliability. DOE Exhibit 17 at 9. The DOE Psychiatrist's Report did not indicate whether the DOE Psychiatrist had concluded that the Individual was sufficiently rehabilitated or reformed to resolve the security concerns raised by his diagnosis of Impulse Control Disorder NOS.

The LSO concluded that the Individual failed to resolve the substantial doubts about his eligibility for a DOE access authorization raised by the Psychiatrist's conclusion that the Individual has Impulse Control Disorder NOS.² Accordingly, an administrative review proceeding was initiated. *See* 10 C.F.R. ' 710.9. The LSO issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter).³ The Notification letter alleges that the Individual has

An illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause a significant defect in judgment or reliability, 10 C.F.R. ' 710.8(h) (Criterion H).

The Individual filed a request for a hearing in which he made a general denial of the allegations contained in the Notification Letter. This request was forwarded to the Director of the Office of Hearings and Appeals (OHA), who appointed me as Hearing Officer.

At the Hearing, the LSO presented one witness: the DOE Psychiatrist. The Individual presented six witnesses: his current wife (the Current Wife), his current mother-in-law, his counselor (the Counselor), a co-worker and two of his former supervisors. The Individual also testified on his own behalf. *See* Transcript of Hearing, Case No. TSO-0315 (hereinafter cited as ATr.®).

² The Notification Letter also references a December 24, 1985 arrest for Aggravated Driving While Intoxicated (DWI). The DOE has not explained the relevance of this information. The Notification Letter does not allege that the Individual uses alcohol habitually to excess or suffers from any alcohol related disorder. Nor did the DOE indicate any relationship between the DOE Psychiatrist's diagnosis of Impulse Control Disorder NOS and this DWI.

³ Criterion H was the sole criterion cited in the Notification Letter.

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. ' 710.27(a).

The regulations state that A[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.@ 10 C.F.R. ' 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. '' 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FINDINGS OF LAW AND FACT

The Individual has a significant history of domestic incidents.⁴ The Individual has two children from his first wife (the Ex-Wife), whom he married on January 12, 1988. In September 1990, the Ex-Wife filed for a divorce, which was finalized in October of 1992. The Record shows that the separation and ensuing divorce were particularly contentious. On February 16, 1992, the Ex-Wife filed a Petition for Order Prohibiting Domestic Violence, alleging that the Individual had, in the presence of their children, threatened to strike her. The Individual denies this allegation. Two days later, on February 18, 1992, the Ex-Wife again filed a Petition for an Order Prohibiting Domestic Violence, alleging that the Individual had threatened to kill her. The Individual initially denied this allegation at the Hearing, but acknowledged that he had cursed at her in the presence of their children. Tr. at 33-36. The Individual subsequently admitted he may have made statements that could have been perceived as threats. Tr. at 42. In October 1993, the Ex-Wife again filed a Petition for Order Prohibiting Domestic Violence, alleging that the Individual had verbally abused her in the presence of their two children during a custody exchange. As a result, the Individual was ordered by the court to obtain counseling for anger management issues. In July 1994, the Ex-Wife again filed a Petition for Order Prohibiting Domestic Violence. In the Judge's decision granting the Ex-Wife's July 1994 request for a protective order, the Judge noted that the Individual "admits to confronting [his former in-laws] during exchange of children, cussing threatening to beat up [his former father-in-law and] throwing a finger. The children were present [and] saw the entire event." Order Prohibiting Domestic Violence, dated August 2, 1994. In an August 4, 1995 PSI, the Individual admitted asking his former father-in-law to "step

⁴ Interestingly, each of these incidents occurred during emotionally trying situations involving his children or stepchild.

out of the car.” DOE Exhibit 37 at 65-66. At the Hearing, the Individual denied that he had ever threatened his former father-in-law. Tr. at 30, 33.

The Individual remarried (to his Current Wife) on September 25, 1993. On October 1, 2004, the Individual was arrested and charged with Aggravated Battery Against a Household Member, Assault Against a Household Member, Interference with Communications and False Imprisonment. A Statement of Probable Cause prepared and signed by the arresting officer states, in pertinent part

On October 1, 2004 . . . I was notified by State Police Dispatch . . . to respond to the . . . hospital emergency room in reference to a report of a victim of domestic violence. . . . I arrived at the hospital and met with the [Current Wife].

* * *

[The Individual] reportedly . . . threw a TV remote control at [the Current Wife] striking her on the right side of the head. [She] said that [the Individual] threw her to the ground and punched her in the head with a closed fist several times and may have kicked her in the leg. [She] did have noticeable swelling of the jaw line on the right side. [She] also had a minor cut under her right ear lobe and dry blood behind her right ear.

DOE Exhibit 31.

At the Hearing the Individual’s testimony concerning the October 1, 2004 incident directly contradicted the arresting officer’s Statement of Probable Cause. The Individual testified that he had thrown the TV remote at a couch. Tr. at 21-22. According to the Individual, the TV Remote then bounced off the couch and hit his Current Wife in the face. Tr. at 18, 21-22. The Individual did admit that he threw the TV remote out of anger. Tr. at 22. The Individual testified that he did not strike his Current Wife with a closed fist, or hit her, as alleged in the Statement of Probable Cause. Tr. at 19-20. The Individual testified that the swelling of the Current Wife’s jaw, which was noted in the Statement of Probable Cause, was likely caused by her chronic jaw problem.⁵ Tr. at 20. The Individual also testified that he did not throw his Current Wife to the ground, as alleged in the Statement of Probable Cause. Tr. at 20-21. Instead, the Individual testified, she inadvertently fell when he tried to grab the phone away from her. Tr. at 23-24; DOE Exhibit 36 at 46 (“I tried to trip her, but I couldn’t. So I went, I grabbed her like this and she fell.”).

⁵ The Current Wife testified that her chronic jaw problem does not result in swelling. Tr. at 128. Moreover, in his November 16, 2004 PSI, the Individual stated: “And I did, I could, if, uh, you wanted, I could probably get, uh, the medical report from the hospital and stuff. I bet you they did not find bruises or anything on her.” DOE Exhibit 36 at 50. Later on in that same PSI, the Individual stated: “And another thing that happened, when *I actually threw her*, her jaw came out of place.” Id. at 52 (emphasis supplied).

However, he subsequently stated that he might have asked his former father-in-law to “step out of the car.” Tr. at 33.

The Individual testified that he is currently obtaining anger management counseling. Tr. at 46. He testified that this counseling has helped him “a lot.” Tr. at 46-47. The Individual testified that he has not lost his temper since the October 1, 2004 incident. Tr. at 47.

The Current Wife testified on behalf of the Individual at the hearing. The Current Wife corroborated the Individual’s contention that he did not strike her with his closed fist, as alleged in the Statement of Probable Cause. Tr. at 114, 116, 118. The Current Wife did testify that the Individual threw the TV remote at her, which aggravated a pre-existing jaw injury. Tr. at 109, 112. The Current Wife was unsure of whether the Individual intended to hit her when he threw the TV Remote. Tr. at 112. The Current Wife testified that the swelling in her jaw was caused by it being hit by the TV Remote. Tr. at 117. The Current Wife also testified that the Individual was benefiting from counseling. Tr. at 123.

The Individual’s Counselor testified on his behalf. The Counselor testified that he has been counseling the Individual on a bi-weekly basis since October 25, 2005. Tr. at 83-84. The Counselor testified that the Individual could not be properly diagnosed with an Impulse Control Disorder. Tr. at 86, 91-92. Specifically, the Counselor testified

I ruled it out mainly because, you know, while some of [the Individual’s] behavior was impulsive, just because someone acts impulsively doesn’t mean they fit under an impulse control disorder. The essential feature being that there is a failure to resist the impulse, but also that the person experiences a sense of tension or arousal before committing the act, and then experiences pleasure, gratification, or some type of relief at the time they are committing the act.

Tr. at 86. Instead, the Counselor thought the Individual should be diagnosed with Adjustment Disorder, with disturbance of conduct, and partner relational problems. Tr. at 84-87, 91. During his testimony, the Counselor provided the following explanation for this opinion:

The DSM-IV states that if an impulse control problem is a feature of another disorder, then the impulse control disorder should be ruled out. So that’s why I didn’t go with that disorder, impulse control disorder, since there is another disorder that better fit [the Individual’s] particular symptoms. If [the Individual] had come in to see me when [he] went through [his] divorce, I probably would have diagnosed [him] at that time with a partner relational problem, which would have been a secondary diagnosis, although I hate to call it secondary since I think that was really the primary underlying stressor. And then I would have also, as a primary diagnosis, given [him] adjustment disorder with disturbance of conduct.

Tr. at 86-87. The Counselor noted that the Individual, in essence, has an anger management problem. Tr. at 93. According to the Counselor, an anger management problem is a coping

deficit rather than a psychiatric disorder. Tr. at 93. The Counselor testified that he had used cognitive therapy to help the Individual recognize the communication problems and maladaptive interactions he was having with his Current Wife and step-daughter. Tr. at 87. As a result, according to the Counselor, the Individual was doing much better. Tr. at 87-88. The Counselor testified that the Individual has improved to the point where his judgment and reliability are no longer affected and the Adjustment Disorder diagnosis no longer is applicable. Tr. at 95-96.

The DOE Psychiatrist was present for the entire hearing, and was able to observe the testimony of the Individual and his witnesses. After the Individual had testified and presented his six witnesses, the DOE Psychiatrist testified. The DOE Psychiatrist agreed that the Individual's anger management problems were "the key clinical issue." Tr. at 134-135. The DOE Psychiatrist testified that he generally agreed with the Counselor's testimony. Tr. at 136-137, 142. The DOE psychiatrist testified that his original diagnosis of Impulse Control Disorder and the Counselor's diagnosis of Adjustment Disorder were similar and further stated "I almost like [the Counselor's] diagnostic choice better than my own." Tr. at 137. The DOE Psychiatrist agreed that the Adjustment Disorder diagnosis is, by definition, self-limiting. Tr. at 139. Noting that the Individual had made changes since he had last examined him, the DOE Psychiatrist testified

Given the fact that my initial diagnosis barely had him in the gray area of impulse control disorder, given the fact that there have been ten months without symptoms, I would think I would have to go along with that diagnostic presentation of [the Counselor] . . . of an adjustment disorder with disturbance of conduct, which actually has a slightly better prognosis, I guess, than impulse control disorder, NOS, and which is no longer present. And therefore I would say, I guess, as of today, I would say that he does not have a mental disorder that I would diagnosis today.

Tr. at 142. Concerning the future possibility of relapse, the DOE Psychiatrist stated

I would give an optimistic prognosis, for a number of reasons. Number one, looks like his family is in good shape and withstood the stress of these past nine months, and that's a good prognostic factor. Most of his problems have occurred in the context of a dysfunctional relationship, at least in that moment in time, and looks like his relationship with his wife is good and has a good prognosis, if you will. . . . The other thing is, I think as horrible as it is for him, this process probably has brought up so much to him the need to maintain control of his anger, that if he did lose control, and certainly I think he's going to be tempted to want to do violence to his wife, daughter or all of the above, but I think even partly because of the therapy that he's gone through, and the cost that it's been over the year, that I think that's going to improve the prognosis, that he's going to think twice before doing any violence. So I think his prognosis for controlling his anger is better, and I would say acceptable.

Tr. at 143-144. Since both experts that testified at the Hearing agreed that the Individual does not currently have an illness or mental disorder that causes or may cause a defect in his judgment or reliability, I find that the security concerns about the Individual raised under Criterion H have been resolved.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has resolved the security concerns raised under Criterion H. Therefore, the Individual has demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's Access authorization should be restored. The DOE may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. ' 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: July 10, 2006